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Supreme Court, U.S.
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No. 97-543

In The

Supreme Court of the United States

October Term, 1997

MICHAEL MARTIN and CYNTHIA MARTIN,

Petitioners,

vs.

MARK HORTON, *et al.*, jointly and severally,

Respondents.

On Petition for Writ of Certiorari to the Court of Appeals of the State of Michigan

BRIEF IN OPPOSITION FOR RESPONDENTS CAS

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STATEMENT OF THE CASE

A. Introduction

Petitioners Michael Martin and Cynthia Martin seek to transform their negligence suit against Respondent Children's Aid Society (hereinafter "CAS") into a claim under 42 U.S.C. § 1983 which was never alleged, pursued or appealed. The claim was not even mentioned until very close to the end of the state appellate process.

In their Petition, the Martins essentially contest — but never mention — the March 29, 1996 refusal of the Michigan Court of Appeals to allow their negligence case against private social workers to be reinvented as a 42 U.S.C. § 1983 cause of action simply for appellate enhancement.

The complex procedural history of this case, recited below, is born of the Petitioners' attempts over a decade to cast and recast their action into whatever form necessary to pursue a civil remedy against virtually every organization, private person, or public official that implemented the Michigan Probate Court's directive following the unanimous finding of a jury in January of 1986 that Petitioners abused their daughter. The finding of abuse has never been disturbed.

B. The Abuse Proceedings

On December 18, 1984, a medical examination of Ashley Martin, then 13 weeks old, revealed numerous broken ribs, possibly as many as 18, in various stages of healing, fractures of both femurs, a bruise on the lower back and a bruise on the left leg. Ashley was placed in a foster home pursuant to the jurisdiction of the Wayne County Michigan Probate Court Juvenile Division.

Mich. Comp. Laws § 712A.2 creates the juvenile division of the probate court and charges it with broad jurisdiction, including protecting the child in case of parental abuse. § 712A.2(b). The probate court has jurisdiction to obtain custody of the child pending a hearing, detain and place the child in a foster home, and receive advice from agencies as to placement of children. §§ 712A.15, 712A.16, 712A.18. It also requires that the probate court receive service plans as to further handling of the child's case from an agency, § 712A.18(f)(2)(3), and requires that review hearings and supplemental orders of disposition be made. § 712A.19. The probate court is required to conduct permanency planning hearings every 364 days if the child remains in foster care and parental rights have not been terminated. § 712A.19a.

After Ashley's placement in a foster home, the Michigan Department of Social Services (hereinafter "DSS") filed a petition seeking to have Ashley made a ward of the court. In January of 1986, a jury trial was held in the Wayne County Probate Court relative to the DSS abuse allegations. The unanimous decision of the jury was that Ashley had been abused. Ashley was accordingly made a temporary ward of the court.

Over the next three years, the probate judges of Wayne County conducted numerous hearings and continued the temporary foster care of Ashley Martin. Following the finding of abuse, the probate court set certain conditions which had to be met before the child could be returned to her natural parents. One of those conditions was that the natural parents accept responsibility for the injuries sustained by Ashley. The Petitioners refused to accept such responsibility then and to this day. The abuse proceedings remained at a standstill for over two years as a result of their refusal.

Pursuant to statute and probate court orders, the DSS had legal responsibility for Ashley. DSS frequently carries out its

duties in these cases by contracting with private organizations to provide the primary case services. CAS is a non-profit child care organization, licensed by the State of Michigan. Pursuant to contract, CAS works with the DSS and the court to render primary case services to abused children. CAS arranges temporary foster care, undertakes to reintegrate the child into the family, prepares treatment plans for the child and the family, and provides court testimony, recommendations, and reports to the court upon request by the court or the DSS. The CAS activities are an integral part of the probate court's statutory duties and powers. In Ashley's case, Respondents, CAS and its individual employees Zak, Travis-Ewing, Clayton and Stoval (hereinafter "CAS Defendants"), performed these primary case services.

Dr. Bennie Stoval is the Director of CAS. It is solely by virtue of this position that she is a party to this suit, although Petitioners have sued her both as the Director and individually. Celia Clayton, Andrea Zak and Kim Travis-Ewing were three case workers employed by CAS who were assigned to the Ashley Martin case.

The Petitioners appealed the January 1986 finding of abuse by the probate court jury and the subsequent continued placement of Ashley in foster care. The appellate process and the probate proceedings relative to continued temporary foster care proceeded contemporaneously in the following two years.

On April 5, 1988, the Michigan Court of Appeals affirmed the abuse finding of the jury, but found that the Wayne County Probate Court had been too rigid in its insistence that the Petitioners admit responsibility for Ashley's injuries as a condition of her return to their custody. *Matter of Martin*, 167 Mich. App. 715, 423 N.W. 2d 327 (1988). CAS and the individual Respondents then fully carried out their duties, as directed by

the court of appeals, the probate court, and DSS to return and integrate Ashley into the Petitioners' family.

C. Civil Proceedings

The procedural history of this case is extensive, involving review of — at a minimum — four separate lawsuits, at least eight different complaints or amended complaints, eight dispositive motions, seven docketed appellate proceedings and more than twenty litigants, each with their own unique set of facts and law.

A fully annotated procedural history is contained at two points in the record below, namely the Appellees' Brief and Cross-Appellants' Brief filed March 24, 1994 in the Michigan Court of Appeals, together with its Appendix, Volumes I-III, (hereinafter "Appeal App."). Additional factual and procedural history is contained in pages one through thirty-nine of Defendants-Appellees' Brief in Opposition to Appellants' Application for Leave to Appeal in the Michigan Supreme Court, and accompanying Addendum (hereinafter "Add.").

However detailed the procedural odyssey of the litigants in this case, two simple truths emerge from a review of the record. First, the lengthy procedural history of this case essentially involves Petitioners' attempts to remanufacture their claims in order to survive the various motions of Respondents and others requiring a plain statement of Petitioners' basis for liability. Second, despite these efforts by Respondents and others which essentially afforded Petitioners every opportunity to raise a § 1983 claim against CAS or any CAS Defendant in the trial court, Petitioners did not do so until their Motion for Rehearing in the Michigan Court of Appeals on February 2, 1996.

Petitioners' omission of a § 1983 claim against the CAS

Defendants was deliberate. In fact, before this action was initiated, on November 16, 1987, Petitioners brought a § 1983 action against certain CAS Defendants and others in federal court. The case was quickly and voluntarily dismissed by Petitioners on November 29, 1987. Contrary to representations of the Petitioners to this Court, the § 1983 claim was never again pled against Respondents.

On March 10, 1988, the Petitioners filed a Complaint in Wayne County Circuit Court, naming Respondents CAS, Stoval, Clayton, the DSS and several of their employees as Defendants (hereinafter "1988 case"). The 1988 case contained no 1983 claim. (Appeal App. 8.)

On March 2, 1989, the Petitioners filed a second action in the Wayne County Circuit Court (hereinafter "1989 case"). As time went on, more persons had become involved with the probate court proceeding and, consequently, Petitioners joined more litigants. Originally, the 1989 case contained no § 1983 claim. (Appeal App. 10.)

The factual basis for both the 1988 and 1989 cases (as well as the federal suit) was that the Defendants had implemented the probate court directive that the Petitioners accept responsibility for Ashley's injuries.

On May 1, 1989, the CAS, Stoval, and Clayton filed a Motion for Summary Disposition in the 1988 case. The Defendants sought dismissal under the common law doctrine of absolute judicial immunity.

On July 14, 1989, the circuit court judge ruled that most of the CAS conduct alleged in the Complaint was "integrally involved in the judicial process and relative to that investigation and decision making process" and thus subject to the protection of judicial immunity. However, the court questioned whether

all actions of the CAS were so protected. Petitioners' counsel then suggested that, in light of the motions filed thus far and the rulings made by the court, a new pleading was needed "to set forth the facts and claims more specifically." (Appeal App. 14, at 23.)

Subsequently, additional confusion developed as to exactly which claims remained against the CAS Defendants, and on September 18, 1989, the Petitioners sought leave to amend the 1988 Complaint. In their formal motion for leave, Petitioners' counsel stated:

> Admittedly, Plaintiffs' Complaint and First Amended Complaint could be construed (or misconstrued) to inartfully state a myriad of vaguely-asserted legal theories: constitutional deprivations under 42 USC 1983 and 42 USC 1985; negligence; third-party contractual beneficiary and intentional infliction of emotional distress. The proposed Second Amended Complaint eliminates some of these theories while specifying and detailing the breaches of duty and contract which Plaintiffs assert subject Defendants to liability.

(Appeal App. 15, at 5.)

Petitioners' motion for leave to amend was granted and, on September 19, 1989, Petitioners filed their Second Amended Complaint in the 1988 cases, alleging only negligence due to the breaches of duty and contract Petitioners had referenced in the above statement. Also, consistent with that statement, § 1983 was neither pled nor mentioned.

The Petitioners also sought leave to amend the 1989 Complaint on February 14, 1990. Subsequently, additional individual motions for summary disposition and consolidation

ensued, and the court delayed ruling on Petitioners' motion for leave to amend.

On February 22, 1991, the circuit court held a hearing on numerous pending motions for both the 1988 and 1989 cases. Applying Michigan law, the court ruled that none of the Defendants were entitled to absolute judicial immunity, that all of the Defendants were entitled to qualified immunity, that the Defendants' qualified immunity could be defeated only by proof of bad faith, and that the undisputed facts showed no bad faith on the part of DSS Defendants, Swiehart, Green, or Hart. DSS' Motion for Summary Disposition was accordingly granted.

The court also ruled that because there were questions of fact as to the bad faith of the CAS Defendants, the actions of the CAS Defendants might not be protected by qualified immunity. By Order dated March 14, 1991, the Motions for Summary Disposition of the CAS Defendants were denied. A similar motion by Dr. Schornstein, a doctor who had examined Ashley at the request of the probate court, was also denied. The court also granted the Petitioners' 1989 case Motion for Leave to File Second Amended Complaint, and ruled that the 1988 and 1989 cases were consolidated for all subsequent proceedings.

CAS and Dr. Schornstein separately appealed the March 14th orders denying their Motions for Summary Disposition. The CAS appeal was refused, but a different panel of the Michigan Court of Appeals granted Dr. Schornstein leave to appeal. By Order dated October 17, 1991 Dr. Schornstein's case was remanded with instructions relative to immunity of witnesses. Dr. Schornstein and Respondents both renewed their dispositive motions based on the ruling.

On January 10, 1992, the trial court granted Dr.

Schornstein's motion and denied Respondents' motion. During oral argument on these motions, Petitioners defined their claim as one in negligence. Section 1983 was not mentioned.

Also on January 10, 1992, Respondents filed a Motion in Limine. (Appeal App. 46.) The Respondents protested that the Petitioners had never disclosed the specific origins of Respondents' alleged duty to the Petitioners. Respondents challenged Petitioners to define *any* statutory or other duty. The Petitioners' February 18, 1992 Response to the Motion in Limine did not even mention § 1983. (Appeal App. 47, at 6.) The following day, Respondents filed a Reply to the Petitioners' Response to the Motion in Limine reiterating that Respondents had been unable to ascertain any legal basis for the duties generally alleged by the Petitioners in the Second Amended Complaint.

On February 21, 1992, the circuit court held a hearing on the Respondents' Motion in Limine. At the hearing, the Petitioners' counsel again asserted that Petitioners' claim was for negligence based on a breach of contractual duty pursuant to service plans and a statutory duty pursuant to a yet unspecified state statute:

> THE COURT:
>
> [O]kay, anything else?
>
> MR. SCHREIER [The Petitioners counsel]:
>
> Only that we did not address duty because as the updated service plans as well as case law as well as statutes make abundantly clear, the responsibility of the social worker was to attempt to unify the family, and all social workers including Miss Clayton, who

> we focus our attack upon if you will, indicate that there are a number of steps that we need to take with the Martins. . . .
>
> MR. KEATING [Respondents' counsel]:
>
> [I]t's not up to the defendants, your Honor, to create a duty for the plaintiffs in this case. We have perused the statute. If I can review the statute, the statute says that the purposes of the statute are to take such actions as will be conducive to the child's welfare and the best interest of the state. . . .

(Appeal App. 49, at 14-16.)

> MR. KEATING:
>
> [T]hat's going to be an issue of law, though, Judge. Duty is an issue of law.
>
> THE COURT:
>
> I've got that, Counsel. And until somebody gives me the Jury instructions which should include the statutes, I can't rule on that and I'm not going to. . . .

(Appeal App. 49, at 22.)

Respondents submitted a proposed order relating to the court's ruling and Petitioners objected. On March 24, 1992, the trial court held a hearing to resolve objections to the order, decide jury instructions, and settle pre-trial order disputes. As promised in February, the court revisited the issue of Respondents' alleged duty to the Petitioners. Petitioners' counsel unequivocally stated that Petitioners claim sounded only in ordinary negligence

arising from violation of the Child Protection Law (Mich. Comp. Laws § 722.628) and the CAS and DSS service manuals. Section 1983 was not mentioned. (Appeal App. 54, at 7-8.)

The trial court then ruled that there was no statutory or contractual duty owed the Petitioners and that the only cause of action remaining was ordinary negligence. Petitioners contested only the nature and extent of the negligence duty, but again mentioned nothing about § 1983. (Appeal App. 54.)

The court next focused on which witnesses would be testifying concerning the issue of the sole duty the court saw as remaining to the Petitioners, *i.e.*, ordinary care under common law negligence. Respondents' counsel sought a recess to consider the court's request:

> MR. KEATING:
>
> [M]ay I briefly have time to think about it? *The complaint does not allege ordinary care duties arising from common law. It alleges only a breach of statute.*
>
> THE COURT:
>
> I don't have the complaint with me anymore. I have seen it in its third incarnation.

(Appeal App. 54, at 20-22.) (emphasis added).

After considerable discussion on the record, the court became increasingly convinced that in addition to the common law negligence claim, Petitioners might be attempting to state a claim in professional negligence. Michigan court rules relating to professional negligence were then addressed:

THE COURT:

> [C]ounsels, why isn't that a claim filed under 3.001, professional negligence. Nobody's asked for 3.001. So I'm fascinated. If, in fact, this is a duty imposed upon a professional based upon the standard of care, and a pleading of that, by the way, which we never had.

(Appeal App. 54, at 23-26.)

After lengthy colloquy, the court concluded no common law negligence duty could be gleaned from the Complaint, and that professional negligence was not alleged. The court adjourned the proceedings indicating that an order of dismissal would likely follow. Section 1983 was not mentioned. (Appeal App. 54, at 26.)

By written order entered April 29, 1992, the trial court ordered summary disposition. The court ruled that: (1) the Petitioners had not presented a statute upon which a negligence claim could be predicated; (2) the Petitioners did not plead or give notice of a claim of professional negligence; (3) the Petitioners had no standing to enforce a contractual claim; and (4) an amendment to the Complaint at this time would severely prejudice the defendants. Section 1983 was never mentioned.

D. Proceedings Before the Michigan Court of Appeals

The Petitioners appealed the April 24, 1992 Order Granting Summary Disposition to the Michigan Court of Appeals claiming various procedural infirmities generally relating to their claim that negligence and/or malpractice had been alleged throughout the proceedings. On a substantive level, Petitioners urged only that summary disposition was improper because there was a state

statute upon which the Respondents were arguably liable and because the Petitioners had stated a valid professional malpractice claim.

While a cross-appeal filed by Respondents urged that Respondents were entitled to absolute quasi-judicial immunity as a defense to any common law claim, and cited some federal cases as persuasive authority, (Add. B), Petitioners' brief on appeal cited no federal cases under 42 U.S.C. § 1983. In fact, Petitioners' brief did not make reference to any federal authority at all. (Add. A, at ii.)

E. The Michigan Court of Appeals Decision

1. The Initial Decision

On January 12, 1996, the Michigan Court of Appeals held that under state law, Respondents were entitled to absolute quasi-judicial immunity in defending Petitioners' common law claim. Accordingly, the court did not reach the only issues raised in Petitioners' appeal which concerned whether malpractice or statutory negligence claims had been properly raised below. *Martin v. Children's Aid Soc'y*, 215 Mich. App. 88, 95, n.3, 544 N.W. 2d 651, 654, n.3 (1996). The majority, as well as the dissent, took note of the circumstance that Petitioners had not alleged a cause of action against Respondents under 42 U.S.C. § 1983. *Martin*, 215 Mich. App. at 96, n.5, 544 N.W. 2d at 655, n.5

2. The Rehearing

On February 2, 1996, Petitioners filed a Motion for Rehearing in the Michigan Court of Appeals, contending a 42 U.S.C. § 1983 claim had been asserted against Respondents all along and that federal law mandated that social workers are not entitled to absolute immunity.

Respondents urged that § 1983 was never alleged against any CAS Defendants, and that to the extent any such action was ever pled, it was waived in the course of the litigation. On March 29, 1996, the court of appeals granted rehearing, and the majority opinion was revised as follows: Footnote one was revised to read:

> The DSS defendants may also be protected by judicial immunity as discussed in part II of this opinion. However, because we conclude in this part that the DSS defendants were protected from liability for other reasons, it is unnecessary to consider whether they were also protected by judicial immunity.

Footnote four was revised to make the following finding:

> We find the appellate court precedents cited hereafter to be compelling notwithstanding concerns raised by Justice Thomas regarding social worker immunity in his dissenting opinion in *Hoffman v Harris*, 511 US __; 114 S Ct 1631; 128 L Ed 2d 354, 355-356 (1994) (Thomas, J., dissenting). We do not believe that the *Hoffman* dissent provides sufficient authority to conclude that the federal precedents we rely upon, all of which involved § 1983 claims, were wrongly decided. Further, Justice Thomas' concerns only apply to immunity afforded to social worker against § 1983 claims. *In the instant case, we conclude that plaintiffs did not allege § 1983 claims against the CAS defendants and, if the pleadings could be interpreted to conclude otherwise, any § 1983 claims against the CAS defendants were waived and abandoned following the dismissal of the DSS defendants.*

(Michigan Court of Appeals March 29, 1996 Order on Rehearing, App. 1.) (emphasis added).

F. Proceedings Before the Michigan Supreme Court

The Petitioners subsequently sought leave to appeal the January 12, 1996 Michigan Court of Appeals opinion to the Michigan Supreme Court. In their application, the Petitioners challenged social worker immunity in a 42 U.S.C. § 1983 action and in a state law tort claim, but did not otherwise address the lengthy record described, *supra*. The Petitioners neither challenged nor appealed from the March 29, 1996 Order.

On April 1, 1997, the Michigan Supreme Court denied Petitioners' Application for Leave to Appeal stating:

> We note that the Court of Appeals majority described its decision as being limited to the facts of this case, "in which the close oversight of the social worker's placement recommendations by the probate court is especially noteworthy."

Martin v. Zak, 562 N.W. 2d 782 (1997). Motion for reconsideration was denied on June 30, 1997. *Martin v. Zak*, 562 N.W. 2d 244 (1997).

REASONS FOR DENYING THE WRIT

I.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DISMISSED FOR WANT OF JURISDICTION.

Petitioners contend that they brought a 42 U.S.C. § 1983 claim against the Respondents but that the Michigan Court of Appeals determined "without elaboration" that a § 1983 claim was not alleged. Both assertions are entirely false and based upon a plain misreading of the record below.

It can not be seriously claimed that a § 1983 action was raised or pursued against any CAS Defendant. Respondents fully briefed this position, and it was adopted by the Michigan Court of Appeals on March 29, 1996. In their Petition, the Petitioners do not even mention the March 29, 1996 Order and virtually ignore the fact that a § 1983 claim was never raised against the CAS Defendants, just as they ignored the issue in the courts below even as it was briefed by Respondents and addressed by the courts.

A. A Claim Under 42 U.S.C. § 1983 was Never Made

1. The Circuit Court

a. The Pleadings Applicable to CAS did not Contain a 42 U.S.C. § 1983 Claim

Only one of the two cases on appeal before this Court contains a § 1983 claim at all. The 1989 Second Amended Complaint attempts to assert a civil rights claim the DSS Defendants only. This language is quoted extensively at pages six and seven of the Petition. That Complaint does not raise a § 1983 claim against CAS.[1]

---

1. Paragraph 51 of the Petitioners' Second Amended Complaint in the 1989 case expressly limits the allegations of Count III, which makes the § 1983 claim, to "Defendants GREEN, SWIEHART, FENISON and HART, individually." Paragraph 6 of the Second Amended Complaint defines these individuals as the "DSS Defendants." The conspiracy language in paragraph 51 merely defines the actions of the DSS Defendants and does not state a cause of action against the parties who are not named in capital letters. The fact that two of the non-DSS parties named (Children's Aid Society and Dr. Schornstein) are not even Defendants in the 1989 case shows that the names supplied are intended merely to be descriptive of the alleged conspiracy by the DSS Defendants. The Second Amended Complaint in the 1988 case. (Appeal App. 18), (Cont'd)

b. Waiver and Abandonment

The Michigan Court of Appeals held on March 29, 1996 that to the extent that the Petitioners may actually have pled a valid 42 U.S.C. § 1983 cause of action against one or more of the Respondents, such a claim was waived and abandoned during the subsequent course of the litigation. (App. A, n.4.) That ruling is as totally supported by the record as it is ignored by the Petitioners.

Particularly telling is the conduct of Petitioners on March 24, 1992 — just before the scheduled trial — when the Petitioners were required by the Court to present the legal basis for their claims under penalty of dismissal. No § 1983 claim is made by the Petitioners in their portion of the Joint Pre-Trial Statement, filed on or about March 24, 1992. No jury instruction relating to a § 1983 claim was proposed. In their argument before the court of appeals that their complaints stated a claim upon which relief could be granted, the Petitioners stood by their March 24, 1992 assertions that their pleadings alleged only a state statutory violation and social worker malpractice. (*See* Plaintiffs-Appellants' Brief on Appeal, Add. A, at 22-23.)

The issue of the nature of the legal basis of the duty which the Petitioners claimed the Defendants owed them was a subject of constant litigation in this case. *See* discussion of civil proceedings, *supra*. Each of the amendments to all of the complaints in this case were the result of either a concession by the Petitioners' attorney, or a ruling by the trial court, that the complaint in force failed to properly or clearly allege the duty

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(Cont'd)

which is the operative pleading relating to the Defendants CAS, Stoval, and Clayton, contains no § 1983 claim, a particularly significant fact since, according to Petitioners, Defendant Clayton always was the person "who we focus our attack upon if you will." (Appeal App. 49, at 14.)

claimed by the Petitioners. Still, the theories claimed by the Petitioners were constantly changing. For example, by February, 1992, the chimerical duty had evolved into unspecified contractual duties arising from "updated service plans" and a negligence action arising from breach of duties required by an unspecified statute. (Appeal App. 49, at 14-16.) *See* discussion, *supra* at p.9.

As discussed previously, on February 21, 1992, the trial court and the parties agreed that the issue of the duties claimed by the Petitioners would be finally resolved at the pre-trial in the context of the proposed jury instructions. (Appeal App. 49, at 14-16, 23.)

Subsequently, at the March 24, 1992 pretrial hearing, the Petitioners stipulated that their only cause of action was in ordinary negligence. The Petitioners also conceded that the duties, whose alleged breach gave rise to the negligence action, were created by the Michigan Child Protection Law and the CAS and DSS manuals. Section 1983 was not mentioned.

This stipulation and concession was made to the trial court on the record, in unequivocal terms:

> THE COURT:
>
> The next issue I believe that comes to me has to do with what are the Jury instructions that would be given to the trier of fact before the commencement of proofs. It is agreed, I believe by the parties, that this is a case which is being posed as a case of ordinary negligence; is that correct?
>
> MR. SCHRIER:
>
> Yes.

THE COURT:

Plaintiff asserts that this duty of ordinary care arises in part from statutes; is that correct, sir?

MR. SCHRIER:

Yes, it is.

THE COURT:

And would you speak to those statutes upon which you believe your negligence claim is based?

MR. SCHREIR:

I'm speaking to a statute that requires by its express terms the department of social services —

THE COURT:

The statute number for the record.

MR. SCHRIER:

As I was saying, the Plaintiffs rely at least in part or every part upon the child protection law, in particular the plaintiffs rely upon M.C.L. 722.628. That statute by its terms appears to pertain specifically to the department. It's our understanding that the department would refer to the Department of Social Services. . . .

It's not just that, the statute that the plaintiffs rely upon, but also the very terms of the Children's Aid Society placement manual and the Michigan Department of

> Social Services manual that the plaintiffs rely upon for finding that the defendants owed them a duty.

(Appeal App. 54, at 7-8.)

The above statement is consistent with the Pre-Trial Statement submitted by the parties which only requests jury instructions relating to a claim of ordinary negligence allegedly arising out of the child protection statutes and updated service plans. (Appeal App. 53, at 9-10.)

Under Michigan law, Petitioners were conclusively bound by admissions at a pre-trial hearing. *Joy Oil Co. v. Fruehauf Trailer Co.*, 319 Mich. 277, 280, 29 N.W. 2d 691, 692 (1947). A party is not only bound by his concession as to what the issues remaining for trial are, but also by the issues he has eliminated from the case. In Michigan, this waiver and elimination may occur in an informal document such as a trial brief and precludes subsequently raising the eliminated issues on appeal. *Kast v. Citizens Mut. Ins. Co.*, 125 Mich. App. 309, 312-13, 336 N.W. 2d 18, 20 (1983); *Ass'n of Hebrew Teachers of Metro. Detroit v. Jewish Welfare Fed'n of Detroit*, 62 Mich. App. 54, 57-58, 233 N.W. 2d 184, 186 (1975).

Under Mich. Court Rule 2.401(C)(1)(a), the trial court and the parties may simplify the issues in the case at the pre-trial hearing. This procedure is intended to allow a judge to require a far more specific statement of the issues to be litigated than merely directing the amendment of pleadings. The pre-trial controls the subsequent course of a case. *Ministrelli Constr. Co. v. Monroe County Road Comm'n*, 153 Mich. App. 144, 149, 395 N.W. 2d 38, 40 (1986); *Banaszewski v. Colman*, 131 Mich. App. 92, 94-95, 345 N.W. 2d 647, 648-49 (1983); *Ashley v. St. Joseph Mercy Hosp. of Detroit*, 14 Mich. App. 289, 165 N.W. 2d 429 (1968). The issues were set forth in the written Pre-Trial

Statement presented to the trial judge and unequivocally stated on the record by the Petitioners' counsel. Such an agreement at pre-trial supercedes even those issues that were actually pled in the Complaint.

2. The Court of Appeals

In their Plaintiffs-Appellants' Brief on Appeal, (Add. A), Petitioners primarily contended that "[t]he Complaint Stated A Claim Upon Which Relief Can Be Granted." The brief focused on Petitioners' claim that the Second Amended Complaint contains a malpractice claim. No claim of a 42 U.S.C. § 1983 cause of action was mentioned.

In Michigan and elsewhere, the appellate tribunal generally declines to consider any issues which were not preserved for appeal by being raised prior to the court of appeals. *Long v. Pettinato*, 394 Mich. 343, 349, 230 N.W. 2d 550, 553 (1975). The issue which the Petitioners seek to raise before this Court was not only waived or abandoned in the trial court to the extent it may ever have been asserted against Respondents, but the issue was also waived in the claim of appeal process and most subsequent proceedings before the Michigan Court of Appeals. *Joplin v. University of Mich. Bd. of Regents*, 184 Mich. App. 497, 498-99, 459 N.W. 2d 70, 71 (1990).

B. Petitioners Have Not Appealed or Addressed Essential Portions of the Court of Appeals Decision on the 42 U.S.C. § 1983 Issue.

Petitioners have postured the issues in their Petition as if the Michigan Court of Appeals had denied the Petitioners' Motion for Rehearing. In fact, the March 29, 1996 Order of the Michigan Court of Appeals *granting* rehearing, (App. 1), is neither referenced, attached, nor otherwise addressed by

Petitioners. However, as previously discussed, the court of appeals granted the rehearing and made two central findings relating to the Petitioners' purported § 1983 claim. First, the court ruled that the Petitioners did not plead a § 1983 claim against Respondents. Second, the court ruled that to the extent the pleadings may be interpreted to assert such a claim, the claim was waived and abandoned by the Petitioners. This decision followed extensive briefing of the issue by Respondents, and was hardly "without elaboration" as now claimed by Petitioners.

The entire Petition presupposes that an action under § 1983 exists in this case. Petitioners treat Respondents' briefs and two specific findings by the court of appeals directly addressing this issue as if they are non-existent.

The two critical findings by the Michigan Court of Appeals on rehearing were not appealed to the Michigan Supreme Court, nor were the issues of whether a § 1983 claim was pled or subsequently waived presented in Petitioners' subsequent application to that court.

C. The Jurisdictional Requirements of 28 U.S.C. § 1257 Are Unsatisfied.

28 U.S.C. § 1257(a) states:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed

> under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

In reviewing the judgments of state courts under the jurisdictional grant of § 1257, this Court has, with very rare exception, refused to consider petitioner's claims not raised or addressed below. *Yee v. Escondido*, 503 U.S. 519, 533, 112 S. Ct. 1522, 1531, 118 L. Ed. 2d 153 (1992); *Adams v. Robertson*, 117 S. Ct. 1028, 1029, 137 L. Ed. 2d 203 (1997).

This is a case where Petitioners did not even attempt to appeal the March 29, 1996 Order of the Michigan Court of Appeals, which expressly held that:

> *[P]laintiffs did not allege § 1983 claims against the CAS Defendants and, if the pleadings could be interpreted to conclude otherwise, any § 1983 claims against the CAS defendants were waived and abandoned following dismissal of the DSS defendants.*

(App. 1.)

> [When] the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can show the contrary.

Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 550, 107 S. Ct. 1940, 1948, 95 L. Ed. 2d 474 (1987). The aggrieved party bears the burden of defeating this assumption. *Webb v. Webb*, 451 U.S. 493, 501, 101 S. Ct. 1889, 1894, 68 L. Ed. 2d 392 (1981).

> We have described in different ways how a petitioner may satisfy this requirement. See Street v. New York, 394 U.S. 576, 583-85, 89 S.Ct. 1354, 1361-2, 22 L.Ed.2d 392 (1969). In some cases, we have focused on the need for petitioners either to establish that the claim was raised "at the time and in the manner required by the state law," Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71, 77-78, 108 S.Ct. 1645, 1650, 100 L.Ed.2d 62 (1988) (quoting Webb, supra, at 501, 101 S.Ct., at 1894), see, e.g., Exxon Corp. v. Eagerton, 462 U.S. 176, 181, n. 3, 103 S.Ct. 2296, 2301, n.3, 76 L.Ed.2d 497 (1983); Beck v. Washington, 369 U.S. 541, 549-54, 82 S.Ct. 955, 959-63, 8 L.Ed.2d 98 (1962), or to persuade us that the state procedural requirements could not serve as an independent and adequate state law ground for the state court's judgment, see, e.g., Hathorn v. Lovorn, 457 U.S. 255, 262-265, 102 S.Ct. 2421, 2426-28, 72 L.Ed.2d 824 (1982). In other cases, we have described a petitioner's burden as involving the need to demonstrate that it presented the particular claim at issue here with "fair precision and in due time," New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 67, 49 S.Ct. 61, 63, 73 L.Ed. 184 (1928); PruneYard Shopping Center v. Robins, 447 U.S. 74, 85, n. 9, 100 S.Ct. 2035, 2043, n. 9, 64 L.Ed.2d 741 (1980). See generally, 16B C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4022, pp. 322-339 (1996).

Adams, 117 S. Ct. at 1029-30.

Similar to this Court's determination in *Adams*, however the requirements are phrased in the instant case, Petitioners have failed to satisfy them. Petitioners have done nothing to demonstrate that they complied with the applicable state rules

for raising their § 1983 claim before the trial court, the Michigan Court of Appeals, or even the Michigan Supreme Court. Under such circumstances, they have totally failed to show why the failure to satisfy the numerous rules involved would not be an adequate and independent ground for the state court to disregard that claim. *See Adams*, 117 S. Ct. at 1030.

II.

REVIEW BY THIS COURT WOULD RESOLVE NO IMPORTANT QUESTION OF FEDERAL LAW.

Sup. Ct. R. 10 provides in pertinent part:

> A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers: . . . (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals; (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A. Judicial Immunity Under Michigan Law Does Not Constitute An Important Question of Federal Law.

1. Decision Under State Law

Because Petitioners essentially pursued a negligence action through the trial courts, because the only issues properly raised

by the Petitioners on appeal related to whether proper negligence or malpractice claims had been brought, and because any immunity discussion in this case pertains only to state common law immunity from those actions, there is no important federal law in question in this case. Even the portion of the court of appeals opinion most supportive of Petitioners' position specifically disavows the possibility that any federal issue might exist in this case. *See Martin v. Children's Soc'y*, 215 Mich. App. 88, 112, n.12, 544 N.W. 2d 662-63, n.12 (1996) (White, J., concurring in part and dissenting in part) (discussing the distinction).

It is undisputed that numerous citations to federal civil rights cases are found within the record of the circuit court, briefs submitted to the Michigan Court of Appeals, decision of the court of appeals, and briefs submitted to the Michigan Supreme Court.

Respondents have cited federal civil rights cases throughout this litigation, but *always as only* ***persuasive*** *authority on the issue of absolute quasi-judicial immunity for social workers in the context of a state negligence claim.* Recognizing that federal civil rights cases on the immunity issue were not binding on Michigan courts in this litigation, Respondents have indicated that the federal law in accord with Michigan law could be used by the Michigan courts as a guidance for application of state law. (*See* Respondents' Cross- Appellants' Brief to the Michigan Court of Appeals, Add. B, at 15-16, 19-20.)

Consistent with this, Respondents have contested cases such as *Malley v. Briggs*, 475 U.S. 335, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986), on the basis that the case only provided persuasive authority, while the Michigan cases directly on point cited by Respondents provided mandatory authority. (*See* Defendants' Reply Brief to Plaintiffs' Response to Defendants' Motion in

Limine, Appeal App. 48, at 3-4; Cross-Appellants' Brief, Add. B, at 24.)

The Michigan Court of Appeals applied the same approach, citing federal cases only as persuasive authority where they found "no Michigan precedent regarding this question." *Martin v. Children's Aid Soc'y*, 215 Mich. App. 88, 97, 544 N.W. 2d 651, 655 (1996). In fact, the footnote to the federal civil rights cases cited by the court of appeals states that these cases are persuasive *despite* being civil rights cases. *Martin*, 215 Mich. App. at 96, n.5, 544 N.W. 2d at 655, n.5.

The court of appeals dissenting opinion illustrates the point. The *dissent distinguished federal cases involving 42 U.S.C. § 1983 from the Petitioners' case on the ground that Petitioners' case involves state, not federal law. Id.* at 112-13, 544 N.W. 2d at 662-63 (White, J., concurring in part and dissenting in part). Obviously, the dissent did not realize that Petitioners would soon claim their case was a § 1983 case after all.

Petitioners' arguments regarding the appropriateness of immunity for social workers is specifically confined to the context of a 42 U.S.C. § 1983 claim itself. However, as should now be apparent, § 1983 was never an issue in this case. Therefore, Petitioners essentially seek this Court's review of a state court's decision made under state law.

2. This Case was Decided on Specific Facts Unrelated to the Blanket Immunity Doctrine

The state law immunity issues and the rulings of the Michigan state courts in relation to those issues were carefully related to the specific facts of this case. The specific facts of this case are particularly unsuitable to test the Petitioners' question presented:

> Whether foster care workers employed by private corporation under contract with the State of Michigan to provide services under state law to parents and children and foster care to children alleged in a Probate Court proceeding to have been abused, are absolutely immune from a suit for damages under 42 U.S.C. § 1983 with respect to *all their activities.*

(Brief for Petitioners, at i.) (emphasis added).

Petitioners seek to challenge the line of authority exemplified by *Kurzawa v. Mueller*, 732 F.2d 1456 (6th Cir. 1984) and *Coverdell v. Department of Social Servs.*, 834 F.2d 758 (9th Cir. 1987) to the extent such § 1983 cases provide Respondents with what Petitioners term as "an all-inclusive blanket absolute immunity" for social workers. Petitioners even suggest the Michigan Court of Appeals found such "blanket absolute immunity" to exist in this case. The Michigan Court of Appeals decision itself expressly refutes this contention. The majority specifically stated:

> [W]hile *Kurzawa* has been described as granting "blanket absolute immunity" to social workers, as the dissent notes, *our decision is not properly so described. It is limited to the facts of this case, in which the close oversight of the social workers placement recommendations by the Probate Court is especially noteworthy.*

Martin, 215 Mich. App. 88, 96, 544 N.W. 2d 651, 655 (1996) (emphasis added).

Hence, the court of appeals majority expressly indicated that its decision to grant immunity arose out of Respondents' status "in operating as an arm of the probate court to protect

abused children." *Martin*, 215 Mich. App. at 97-98, 544 N.W. 2d at 655-56. This reference to the highly supervised nature of Respondents' activities was made just as the court of appeals limited its holding, rejecting the very proposition Petitioners now wish to have reviewed.

In effect, the state court's determination reflects that "this case has a central, unbending reality which the court has requested to consider — *Plaintiff's alleged damages flow from the actions of the Probate Court*." (Brief in Support of Defendants' Motion for Summary Disposition, Appeal App. 42, at 5).

In the opinion denying leave to appeal from the Michigan Court of Appeals, the Michigan Supreme Court also noted:

> [T]hat the Court of Appeals majority described its decision as being limited to the facts of this case "in which the close oversight of the social worker's placement recommendations by the probate court is especially noteworthy."

Martin v. Zak, 562 N.W. 2d 782 (1997).

Hence, and as reflected at every stage of the litigation below, this case could never present a proper basis for review of any federal blanket immunity doctrine. To the contrary, the fact that the Respondents did exactly what they were ordered to do by the probate court has been noted at each stage of the litigation, and consistently noted by each state appellate court even while refusing to extend Michigan's common law immunity to include blanket immunity.

3. This Court has Declined to Review the Issue Whether Social Workers are Immune from 42 U.S.C. § 1983 Liability.

Even if the many attempts delineated above by Petitioners to recast both the factual and legal underpinnings of this case as a § 1983 claim were successful, recent decisions of this Court would suggest that the hypothetical case thereby created would not be appropriate for review by this Court. As Petitioners note, similar Petitions for Certiorari have been denied in the recent past. *See, e.g., Hoffman v. Harris*, 511 U.S. 1060, 114 S. Ct. 1631, 128 L. Ed. 2d 354 (1994); *Doe v. Bennett*, 510 U.S. 1164, 114 S. Ct. 1189, 127 L. Ed. 2d 539 (1994).

CONCLUSION AND RELIEF REQUESTED

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A — ORDER OF THE COURT OF APPEALS FOR THE STATE OF MICHIGAN DATED MARCH 29, 1996

Court of Appeals, State of Michigan

Michael Martin

v

Warren Swiehart

Docket # 140360, 152486, 152489

L.C. # 88-805900, 89-905474-CZ, 89-905475

Helene N. White
Presiding Judge

Richard A. Bandstra
Walter P. Cynar
Judges

ORDER

The Court orders that the motion for rehearing is granted and that footnotes 1 and 4 of the majority opinion issued January 12, 1996 are revised to read as follows:

1. The DSS defendants may also be protected by judicial immunity as discussed in part II of this opinion. However, because we conclude in this part that the DSS defendants were protected from liability for other reasons, it is unnecessary to consider whether they were also protected by judicial immunity.

Appendix A

4. We find the appellate court precedents cited hereafter to be compelling notwithstanding concerns raised by Justice Thomas regarding social worker immunity in his dissenting opinion in *Hoffman v. Harris*, 511 US __; 114 S Ct 1631; 128 L Ed 2d 354, 355-356 (1994) (Thomas, J., dissenting). We do not believe that the *Hoffman* dissent provides sufficient authority to conclude that the federal precedents we rely upon, all of which involved § 1983 claims, were wrongly decided. Further, Justice Thomas' concerns only apply to immunity afforded to social workers against § 1983 claims. In the instant case, we conclude that plaintiffs did not allege § 1983 claims against the CAS defendants and, if the pleadings could be interpreted to conclude otherwise, any § 1983 claims against the CAS defendants were waived and abandoned following the dismissal of the DSS defendants.

A true copy entered and certified by Ella Williams, Chief Clerk on

MAR 29 1996
Date

s/ Ella Williams
Chief Clerk

[seal]
STATE OF MICHIGAN
COURT OF APPEALS